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No. 99-881

In the
Supreme Court of the United States

LLOYD A. GOOD, JR.,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AMERICAN FOREST & PAPER ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Federal Circuit erred in holding--contrary to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and in conflict with the decisions of many other federal courts of appeals and state appellate courts--that a government regulation depriving a property owner of all economically viable use of his land does not result in a *per se* or categorical taking under *Lucas* unless the property owner can also prove "reasonable, investment-backed expectations."

2. Whether the Federal Circuit erred in holding that a property owner who is denied federal permission to develop his property because of the presence of endangered species lacks a reasonable expectation of developing the property--even though he purchased it *prior to* enactment of the Endangered Species Act and the listing of the species in question--because he should have been aware that the "growing consciousness of and sensitivity toward environmental issues" would ultimately change "the regulatory climate" so as to bar his planned development.

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INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Attorneys for Pacific Legal Foundation have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and have participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. Pacific Legal Foundation has represented two clients in two petitions for writ of certiorari in cases that involved nearly identical issues to the one at bar. *See Kim v. City of New York*, 659 N.Y.S.2d 145, 681 N.E.2d 312, *cert. denied*, 118 S. Ct. 588 (1997); *Bell v. City of Virginia Beach*, 255 Va. 395, 498 S.E.2d 414, *cert. denied*, 119 S. Ct. 73 (1998). It has also filed amicus curiae briefs in support of petitioners in three other cases that have been submitted to this Court with issues identical to the present ones. *See Basile v. Town of Southampton*, 89 N.Y.2d 974, 655 N.Y.S.2d 877, 678 N.E.2d 489, *cert. denied*, 118 S. Ct. 264 (1997); *Gazza v. New York Department of Environmental Conservation*, 89 N.Y.2d 603, 657 N.Y.S.2d 555, 679 N.E.2d 1035, *cert. denied*, 118 S. Ct. 58 (1997), and *Forest Properties, Inc. v. United States*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, __ U.S. __ (1999). Pacific Legal Foundation

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation and American Forest & Paper Association affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

attorneys are also currently representing Claude and Micheline Lambert in a petition for certiorari before this Court in *Lambert v. City and County of San Francisco*, Supreme Court Docket No. 99-697, another case in which an appellate court denied a property owner relief for a regulatory taking. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

Amicus American Forest & Paper Association is the national trade association of the forest, pulp, paper, paperboard and wood products industry. American Forest & Paper Association represents approximately 400 member companies and related trade associations (whose memberships are in the thousands) which grow, harvest, and process wood and wood fiber; manufacture pulp, paper, and paperboard products from both virgin and recycled fiber; and produce solid wood products. With an annual payroll of approximately $46 billion, this vital national industry accounts for over 8% of the total United States manufacturing output, employs some 1.4 million people, and ranks among the top ten manufacturing employers in 46 states. Members own approximately 50 million acres of private forest land throughout the United States.

Pursuant to Supreme Court Rule 37.2(a), written permission from all parties for Pacific Legal Foundation and American Forest & Paper Association to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

During the 19th century, when private individuals acquired riparian wetlands from the State of Florida they acquired an "absolute proprietary interest in the lands" while any land *under* a navigable waterway was also "subject to a governmental duty to protect the public rights of navigation and fishing." Michael L. Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/*

Proprietary Distinction, 34 Univ. Fla. L. Rev. 561, 585 (1982). In other words, property owners had, under traditional state law, the right to improve nonsubmerged wetlands. *See id.*

In 1899 Congress passed the Rivers and Harbors Appropriation Act of 1899. Title 33 U.S.C. § 403 of that Act prohibits the obstruction of navigable waterways unless the Secretary of Army authorizes the work. In the early years, with rare exceptions, the Secretary denied authorizations only when the work would obstruct commerce. *See Zabel v. Tabb*, 430 F.2d 199, 207-08 (5th Cir. 1970). In time, especially as prompted by other statutory concerns, the Secretary denied authorizations for ecological reasons. *Id.* at 209. And in 1972 Congress adopted a version of the Clean Water Act that added section 404, codified at 33 U.S.C. § 1344, giving the Secretary further regulatory authority over "waters of the United States." At no time did Congress ever assert title to privately owned wetlands or tidelands (except to the extent that a navigational servitude has always existed for the protection of navigation).[2]

In 1973 Lloyd Good and his late mother purchased 40 acres of property on Lower Sugarloaf Key in Florida. Opinion of the United States Court of Appeals for the Federal Circuit, *reproduced in* Petitioner's Appendix at 2a. Thirty-two acres of this parcel is wetland. *Id.* The Goods were aware that they would have to obtain state and federal permits to develop this property, and they were aware that the process could be cumbersome. *Id.* However, nothing in the existing regulatory regime gave rise to an understanding that permits would ***not*** be forthcoming, and certainly there is nothing in the record to indicate that compensation would not be forthcoming if the necessary permits were denied.

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[2] The trial court found that the navigational servitude did not cause a denial of all economically viable uses in Petitioner's property. Opinion of the Court of Federal Claims *reproduced in* Petitioner's Appendix at 48a.

Later in 1973 Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, *et seq*. In 1975 the Corps expanded the scope of its regulatory jurisdiction under the Clean Water Act. *See* Opinion of the Federal Circuit Court, Pet. App. at 13a (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985)). In the late 1970's the State of Florida passed its own legislation that protected endangered species and the Florida Keys. *See* Opinion of the Federal Circuit Court, Pet. App. at 14a.

Lloyd Good began the odyssey of trying to develop his property in 1980. *Id.* at 2a. At first, Good had no trouble with the United States, having obtained a dredge and fill permit in 1983. *Id.* at 3a. This permit was replaced with a new but substantially similar permit in 1988. *Id.* at 3a, 5a. He obtained all of his required state permits by 1984, *id.*, and would have been able to develop his land at that time but for an appeal brought by the Florida Department of Community Affairs. *Id.* at 4a. As so often happens in land development cases, and as set out in detail in the opinions below, Good's journey through the regulatory maze turned from Byzantine to Kafkaesque. *See id.* at 4a-7a, *and* Opinion of the Court of Federal Claims, Pet. App. at 19a-41a. Problems with the federal, state, and local permitting agencies put a halt to any thoughts of a quick resolution.

Pursuant to the Endangered Species Act, and while Good was in the throes of the permit process, the Lower Keys marsh rabbit was listed as endangered in 1990 as was the silver rice rat in 1991. Opinion of the Federal Circuit Court, Pet. App. at 6a-7a.

The dredge and fill permit that Good obtained in 1988 expired on October 17, 1993. *See id.* at 7a *and* Opinion of the Court of Federal Claims, Pet. App. at 24a. Prior to 1993 the Fish and Wildlife Service had recommended modifications to the 1988 permit in order to protect the rabbit and rat but the Corps

failed to act on those recommendations before the permit expired. *See* Opinion of the Federal Circuit Court, Pet. App. at 7a *and* Opinion of the Court of Federal Claims, Pet. App. at 24a. Good applied for a new scaled back permit in July of 1990. *See* Opinion of the Federal Circuit Court, Pet. App. at 5a-6a. Almost four years later, and based on the Fish and Wildlife Service's recommendation, the Corps denied this permit application in March of 1994. *Id.* at 7a. The Corps also notified Good that the 1988 permit had expired. *Id.*

This action followed.

Good argued that the Corps' permit denial deprived him of all economically viable use of his property. The trial court did not agree, finding that 14 years of the permit process were not enough and that Good might have been able to secure permission to build a less intensive development. *See* Opinion of the Court of Federal Claims, Pet. App. at 59a. The trial court was also impressed by evidence that the property had some *value*, *id.* at 68a-71a, and that the existence of transferable development rights, under a state program, provided the potential of enough value to obviate a taking.[3] *Id.* at 74a.

The Federal Circuit found that it did not need to reach the issue of whether the regulatory action deprived Good of all economically viable use of his property. *See* Opinion of the Federal Circuit Court, Pet. App. at 9a. Instead it found that, regardless of whether there had been a denial of economically viable use, Good "could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in

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[3] The court concluded that this Court held in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, that "the value of TDRs is to be considered to answer the threshold question of whether a taking has occurred." Opinion of the Court of Federal Claims, Pet. App. at 74a. This Court, however, finding "we have no occasion to decide" the relevance of TDRs to the existence of a taking, expressly declined to reach that issue. 520 U.S. at 728.

order to develop the land." *Id.* at 12a. That is because the court concluded that Good was "[s]urely . . . not oblivious" to the trend of "rising environmental awareness translated into ever-tightening land use regulations." *Id.* at 14a.

REASONS FOR GRANTING THE WRIT

I

SUMMARY AND INTRODUCTION

At bottom, this case is about whether there remains any meaning to the concept of "background principles" to the law of property. Are property rights as evanescent as the fog or are the rights that are associated with the ownership of property anchored in a more solid firmament? Pacific Legal Foundation and American Forest & Paper Association are becoming increasingly alarmed by a trend in some of the lower courts that denies just compensation for regulatory takings simply because of the fortuitous circumstance that the offending regulation is adopted--but not necessarily applied--before the complaining owner acquired the affected property. In fact Pacific Legal Foundation and American Forest & Paper Association believe this trend represents the single greatest threat to the established principles of property ownership in the nation.

As alarming as this trend is, we could not have imagined how damaging it could possibly become until confronted with the *reductio ad absurdum* extension of the doctrine in the present case. Here, there is more than the mere happenstance of a not-yet-applied regulation being adopted prior to the acquisition of property that traps the owner. In the case of Lloyd Good, the court below found that Mr. Good ***knew***, or at least "was not oblivious" to the "trend," of "rising environmental awareness" that might translate into the adoption of "ever-tightening land use regulations." *Id.* at 14a. According to the court below, the knowledge that an offending regulation might be adopted ***after*** the acquisition of the property means

that Mr. Good has no right to complain after that regulation is ultimately adopted and applied. *Id.*

This case asks whether Lloyd Good is entitled to compensation because the United States refused to give him a permit to make economic use of his land. To answer this question, one must first understand the nature of the "background principles" of the property rights that attach to Good's property. Next, one should determine whether the evolving scheme of regulatory constraints may have affected those "background principles" to such an extent that he is not entitled to compensation.

Lloyd Good's petition focused on the lower courts' misunderstanding of the relevance and meaning of this Court's "reasonable investment backed expectations" test in the context of a climate of "ever-tightening land use regulations." This amicus brief will focus on the conflict the decision below creates with established understandings of the "background principles" of property. Amici will demonstrate that the Circuit Court's opinion is inconsistent with the principles embodied in the Constitution whereby the Framers understood that the role of government is to protect private property, rather than acquire it without compensation. In this light, the opinion is also in conflict with opinions of this Court and several lower courts as well.

II

PROPERTY DOES NOT CHANGE FORM WHEN NEW REGULATIONS ARE ADOPTED OR WHEN WE CAN ANTICIPATE THE ADOPTION OF NEW REGULATIONS AND THEN THE OWNERSHIP IS SUBSEQUENTLY TRANSFERRED

Central to the decisions of the courts that have ruled that third party purchasers cannot maintain a takings claim is the thesis that property is a highly mutable commodity. Under this theory, the alteration of property is a two step process. First, a

regulatory restriction is adopted (or, in this case, contemplated). That restriction may flow from many sources. Here, for example, a restriction might derive from the adoption of the Rivers and Harbors Appropriation Act of 1899, the Clean Water Act, or the Endangered Species Act. Such a restriction may remove certain development rights from the property--or at least make them subject to a permitting requirement. But the adoption of the restriction itself does not alter the original owner's ***rights*** to the property or the development rights. An owner could recover just compensation if the owner can prove in a facial or as-applied challenge that a regulatory taking has occurred.

The second step that completes the alteration of the property is the acquisition by a third party ***after*** the regulation is adopted (or contemplated). If the original owner could not bring a facial takings challenge,[4] and if the original owner could not bring an as-applied challenge (due perhaps to the lack of financial resources to pursue an application, the lack of desire to develop the property, or the premature demise of the owner), then the restricted development rights devolve to the government upon the moment the remainder of the property is transferred to a third party. Here, the third party is Lloyd Good who purchased the property. Because Good bought his property when regulatory restrictions were already foreseeable he cannot now argue that his development rights have been "taken."

The court below couched this result in terms of Mr. Good's "investment-backed expectations." That analysis is lacking. If the original owner had legitimate expectations and

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[4] With respect to wetlands regulations, this Court has observed that the mere existence of a permitting requirement does not give rise to a taking. A wetland owner must try, and fail, to obtain a permit before a taking can be alleged. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 126.

Mr. Good did not, than where did the expectations go and when? The court surely is not suggesting that the expectations disappear the moment regulations are adopted or contemplated. But the alternative, that expectations disappear upon sale, is equally dissatisfying.

If one instead focuses on where the development rights have gone, it is clear that they now belong to the government. The original owner has sold all rights to the property and lacks the requisite legal interest to file an application to develop the property; the original owner cannot ripen a takings claim and has no property interest left to vindicate. The new owner can apply for permission to develop. But if permission is denied based upon the application of a regulatory restriction that is in place at the time of acquisition, the new owner cannot receive any compensation for the lost development rights. Thus, the court's focus on Good's apparent lack of "investment-backed expectations" is only a focus on the ***mechanism*** of how Good is found to have no compensable development rights. But the ***result*** of the court's decision is a rule that interests in property are transformed when regulated property changes hands. The "bundle of sticks" that make up property is split into two: those interests that are restricted by the regulation devolve to the government and the new owner keeps whatever is left. This alteration of the property, of course, may be inchoate at the time of the property transfer and may not be apparent until permit applications are denied.

In the case of Lloyd Good, the situation is more surreal. The denial of his application was not based solely upon regulatory restrictions in place at the time he purchased his property, but on restrictions that followed from the Endangered Species Act, which was adopted several months after he purchased the property. And what is more, the listing of the Lower Keys marsh rabbit and the silver rice rat did not occur until nearly two decades after the purchase.

What exactly does this imply? If the past is any guide to the future, anyone purchasing property today is capable of understanding that newer and more onerous land-use restrictions may be adopted in the future. Thus, the transformation of property in this nation is complete and total. Because we all are "not oblivious" to the "rising tide" of land-use regulation, we can all anticipate that governments will adopt far more sweeping and onerous land-use restrictions in the future (especially now that the restraint of just compensation has apparently been removed). In fact, most property owned today was acquired at a time when future regulations, whether they be environmental, zoning, or social, could be anticipated by those who were "not oblivious" to their surroundings. Thus, the result of the court's reasoning is that all right to use property is not truly a right possessed by individuals but instead is held by the government. Sometimes the government may give an "owner" the "right" or, more accurately, the "privilege" to develop property; other times the government may deny permission. And because the government holds the development rights, and especially because the putative owner of the property should have known this, there can be no complaint for just compensation.

Why the government should obtain a windfall just because the property's original owner did not bring a ripened takings claim has never been explained. It is true that the subsequent purchaser may have acquired the regulated property at a discount. But why should this matter? The new owner is assuming certain expenses, risks, and transaction costs in pursuing the permit process and takings claim. The question here is not whether any just compensation damages are fairly allocated between the original owner and the subsequent purchaser, but whether the government will have to pay any damages at all to anyone at all. Under the Federal Circuit's rule, the answer is no. Because the owner at the time the regulatory

scheme was adopted (or, in this case, contemplated) was not the same person who made the permit applications, the government gets the benefits of a regulatory taking with none of the costs.

The notion represented by the court's decision that the right to use and develop property is not a fixed and solid right, but instead is something that can easily devolve to the government (if it has not already devolved) upon the transfer of property is a notion that should trouble this Court. For one thing, it would seem to be a notion that was rejected a long time ago in the beginning days of the republic. The debate is not new between those who have theorized that rights derive from the state and those who suggest that rights are inherently possessed by individuals. What is new for this Court is the expression of the first theory by the Federal Circuit Court of Appeals in the otherwise innocuous realm of environmental regulation. The remainder of this brief will demonstrate that the theory of the Federal Circuit's opinion is contrary to the history and structure of the Constitution, the opinions of this Court, and the opinions of other lower courts.

A. The History and Structure of the Constitution Is Antithetical to a Theory That Government Can Acquire the Right to Use and Develop Property Without Paying Just Compensation

John Locke wrote that property, in the fullest understanding of the meaning of that word, is a right inherently possessed by individuals and that individuals only give up certain rights to government in order to better protect their property:

> [Man] seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.

> The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property.*

John Locke, *Two Treatises of Government*, The Second Treatise § 123 (Peter Laslett ed., 2d ed. 1967, amended 1970) (emphasis, spelling, and punctuation in original). As many legal scholars have noted, Locke's idea that government is instituted to protect property, rather than the government being the source of property, deeply influenced the Framers, especially James Madison, as they drafted the Constitution. *See, e.g.,* Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* 14-19 (1997) (discusses Locke's influence); Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* 228-30 (1993) (same); Henry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 Univ. of Puget Sound L. Rev. 351, 378-80 (1987) (same); *see also* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 41, 314-15 (1996) (discusses Madison's growing concern over usurpation of property by local governments); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 554-55, 578-79 (1972) (discusses precursors to adoption of Lockean view in federal constitution).[5]

The structure of the original constitution was designed to protect property from, among other things, popular agitation for "an abolition of debts, for an equal division of property, or for

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[5] It would be, of course, quite superficial to suggest that only John Locke influenced the Framers' views of the relationship between government and property and the role of property in society. Space, and respect for this Court's time and patience, does not permit amici to embark upon an exhaustive explication of the historical and philosophical understandings of property. For a fuller recent treatment of the subject see Richard Pipes, *Property and Freedom* (1999).

any other improper or wicked project." The Federalist No. 10 (James Madison) (Bantam ed., 1982). Later the Fifth Amendment added an even more explicit protection of private property.

The difficulty posed by the decision below is that all the words about the role of government to protect property would be hollow formalisms if government truly possessed the right to use and develop privately owned property that the government has neither purchased nor condemned. The Framers' conception of property would be equally meaningless if the government could acquire those critical rights upon the mere adoption (or, as in this case, upon the mere contemplation) of a regulation followed by the transfer of the underlying property to a new owner.

A lower federal court posed the dilemma this way:

> Under such logic, [government] . . . could pass a law that stated that no one could build on their property. After all property had passed hands once, the right to build on one's property would be lost to everyone.

Store Safe Redlands Associates v. United States, 35 Fed. Cl. 726, 735 (1996). Such a scheme for government acquisition of property is inconsistent with the Framers' vision of the relationship between property owners and their government. The Framers contemplated only one way by which the federal government could acquire private property against the will of the owner--through the use of the condemnation power. *See* Stoebuck, *supra*, at 576-77; Siegan, *supra*, at 27. Only this Court can restore the balance.

B. The Opinion of the Circuit Court, That Government Can Acquire Development Rights in Property Merely by Adopting Regulations and Waiting for the Land to be Transferred to a New Owner, Is in Conflict with Opinions of This Court

1. This Court Has Enforced Constitutional Limitations on the Ability of Governments to Take Property Without Compensation

In its early years this Court came down strongly against uncompensated usurpations of private property by government. In *Fletcher v. Peck*, 10 U.S. 87 (1810), this Court examined Georgia's attempt to reacquire the title to millions of acres of land that had been purchased by good faith purchasers from others who had acquired the land from Georgia through corruption. Justice Marshall found the "act of transferring the property of an individual to the public" was both oppressive and a violation of the Contracts Clause. Georgia could not "pass[] a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void." 10 U.S. at 139. In *Terrett v. Taylor*, 13 U.S. 43, 50-51 (1815), Justice Story wrote that Virginia's attempt to take property of the Episcopal Church was "utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property regally acquired."

Amici submit that the federal government cannot do indirectly what Georgia and Virginia could not do directly.

2. This Court Has Not Countenanced Government Defining Property Anew in Order to Take It

In more modern times this Court has again returned to the understanding that government cannot alter the meaning of property in order to divest it from private owners. In *Hughes v.*

State of Washington, 389 U.S. 290, 296-97 (1967), Justice Stewart, concurring, noted that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." A retroactive assertion that property did not exist is no different from the court below holding that the development rights in Lloyd Good's property vanished (or were divested to the federal government) upon his acquisition of the property.

Nowhere did this Court more clearly demonstrate the fallacy of the Federal Circuit's holding in *Good* than in *Nollan v. California Coastal Commission*, 483 U.S. 825, where this Court wrote:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Id. at 833 n.2.

More recently still, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992), this Court again returned to the idea that "the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." This Court held that the proper focus must be upon the "background principles" of property: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. This

implies the existence of principles that do not whimsically change every time newly regulated property changes hands.

In a recently published article, Professor Steven J. Eagle is highly critical of the notion that just compensation is not available when the application of a regulation takes private property just because the owner purchased the land subject to an existing regulatory scheme. *See* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the Rule of Law*, 42 N.Y.L. Sch. L. Rev. 345, 376 (1998). One of Professor Eagle's principal criticisms is that this doctrine artfully rewrites this Court's holding in *Lucas*. Focusing on several holdings from New York that reached the same conclusion as the Federal Circuit in this case, Eagle suggests that the right to bring an inverse condemnation claim must be transferable with the property. Otherwise, the court

> converts an important component of the fee simple--the right to use one's land--into a personal right that has to be exercised during life or else vanishes.

Id. at 368.

The opinion of the court below strays from the principle that government cannot rewrite the definition of property in order to suit its own needs. In short, the adoption of a land-use or environmental regulation cannot destroy the right to use or develop property without compensation either before or after the property is acquired by a third party. This Court should take review in order to ensure that the lower courts no longer countenance the alteration of "background principles" through a post-regulatory transfer of property.

3. The Doctrine of Investment-Backed Expectations Does Not Grant Government License to Take Riparian Property

To be fair, of course, the court below did not overtly say that it was redefining the nature of newly regulated property

with every subsequent transference of that property. As noted earlier, the court couched its holding in terms of Mr. Good's "reasonable investment-backed expectations." In this regard the court was relying on this Court's opinion in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978), where it was noted that an analysis of reasonable investment backed expectations is one factor that a court may look to in determining whether there has been a regulatory taking. This Court, at 438 U.S. at 128, credited the derivation of this test to Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1229-34 (1967). But Michelman cautions that expectations are not the exclusive way of defining property for he later said that there

> seems to be little historical or philosophical basis for a conclusion that constitutional property rights are exclusively reliance-based or expectation-based, that they are purely derivative and in no way direct, and that what counts as constitutionally protected property can at any moment be fully told by deciding what entitlements can from time to time be inferred from official standing law.

Frank I. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1103 (1981). Michelman finds unsatisfactory the result of a pure expectations theory that, when combined with a denial of compensation to riparian owners, would force those riparian owners to discount the value of their property. *Id.* at 1106. Instead, Michelman believes there "must be some kind of direct right of property under the Constitution" and cites *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), as a paradigmatic example where the rights of

riparian owners were protected ***despite*** expectations. *Id.* The Corps could no more take Kaiser-Aetna's property without paying for it then it can take Lloyd Good's.

C. There Is Great Conflict Among the Lower Courts on the Question of Whether the Government Acquires a Property Interest upon a Third Party's Acquisition of Regulated Property

To be sure, several states in recent years have adopted the same rule followed by the Federal Circuit below. These states include New York, *see, e.g., Kim v. City of New York*, 659 N.Y.S.2d 145, 681 N.E.2d 312, *cert. denied*, 118 S. Ct. 588 (1997); Virginia, *see Bell v. City of Virginia Beach*, 255 Va. 395, 498 S.E.2d 414, *cert. denied*, 119 S. Ct. 73 (1998); Iowa, *see Hunziker v. Iowa*, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995); and New Hampshire, *Claridge v. New Hampshire Wetlands Board*, 485 A.2d 287 (N.H. 1984). Amici find this to be a most disturbing trend.

But other states and the Ninth Circuit have rejected this rule. For example, New Jersey recently held in *Karam v. State of New Jersey Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998), *aff'd by adopting appellate opinion*, 723 A.2d 943 (N.J. 1999), that the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge. The Ninth Circuit in *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994), found that an as-applied but not a facial takings challenge can be brought by a purchaser of regulated property. Likewise, in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 118 S. Ct. 1359 (1999), the Ninth Circuit allowed a landowner's takings claims to proceed despite the fact that land was purchased with knowledge of permitting requirements. In Florida the court in *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223,

1229, *reh'g denied*, 613 So. 2d 3 (Fla. 1992), held that even though Vatalaro acquired property after a regulatory scheme was adopted, she could still pursue an as-applied takings claim. The court reasoned that no taking occurred until after the state denied Vatalaro's permit application when the state determined her property was suitable only for limited passive recreational use. *See also Cottonwood Farms v. Board of County Commissioners of the County of Jefferson*, 763 P.2d 551, 555 (Colo. 1988) ("The majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor.").

Despite earlier indications to the contrary in *Preseault v. United States*, 100 F.3d. 1525 (Fed. Cir. 1996) (subsequent owners can pursue regulatory taking claim against federal government even though challenged regulation that allegedly took property was adopted long before acquisition by current owners), the Federal Circuit in *Good* has clearly joined New York, New Hampshire, Virginia, and Iowa. Its holding is in conflict with the Ninth Circuit, and the courts of New Jersey, Florida, and Colorado. It is time for this Court to resolve this conflict.

III

CONCLUSION

Lloyd Good lost his property because he was not oblivious to the potential that more onerous land-use regulations might be adopted after his purchase. This rule is contrary to the United States Constitution, opinions of this Court, and the holdings of at least four other inferior tribunals. It represents, however, a trend that has been adopted in four states and that poses the most significant threat to well-established understandings of the

place of property rights in this Nation. It is respectfully submitted that this Court grant the petition for writ of certiorari.

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Respectfully submitted,

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